APPEAL NO. 93187

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). At a contested case hearing held in (city), Texas, on February 2, 1993, where the parties stipulated that on (date of injury), the appellant (claimant) sustained a low back injury while in the course and scope of her employment with (employer), the hearing officer determined adversely to claimant the four disputed issues, to wit: 1) whether claimant had disability from May 1, 1992 through October 4, 1992; 2) whether claimant suffered esophagitis as a result of taking medicine prescribed for her (date of injury) low back injury; 3) whether claimant suffered a chipped tooth in the course and scope of her employment on (date of injury); and 4) whether claimant was able to obtain and retain employment after October 4, 1992, and if not, was claimant's inability to obtain and retain employment and need for medical treatment after October 4, 1992, the result of the (date of injury) injury or the result of an October 4, 1992 injury. Claimant has requested our review asserting that the hearing officer lacked impartiality, that the Appeals Panel lacks jurisdiction over the issue of whether respondent (carrier) is liable to claimant for temporary income benefits (TIBS), and the aforesaid disability issues, because they were not previously considered at a benefit review conference (BRC), and that the findings of fact and conclusions of law are not sufficiently supported by the evidence. In its response the carrier asserts that the parties agreed to the four disputed issues to be considered below, and that the evidence does support the hearing officer's factual findings and legal conclusions.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm.

In Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992, a case involving these same parties, the Appeals Panel affirmed the decision of the hearing officer, as reformed, which determined that the suspension by the carrier of the payment of temporary income benefits (TIBS) to claimant as of May 1, 1992, was justified because she was found to have abandoned medical treatment without good cause pursuant to the procedures in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.4 (Rule 130.4).

We find no merit in claimant's assertion that the hearing officer lacked impartiality. Our careful review of the record reveals that the hearing officer conducted the hearing not only with fairness and impartiality, but also with patience given that claimant was not represented.

Claimant's assertion of the lack of jurisdiction over the disability issues is similarly without merit. The record reflects that the parties agreed that the four disputed issues stated above were the issues to be determined by the hearing officer, and the hearing officer read them from the statement of disputed issues attached to the Benefit Review Conference

Report of December 16, 1992, which was in evidence.

The stipulated low back injury of (date of injury), occurred when claimant began to sit on a chair, slipped off, and fell to the floor on her buttocks. She first saw .(Dr. B) for treatment on May 17th. Dr. B's record of September 17, 1991, states that following an MRI of September 6, 1991, claimant was diagnosed with a herniated disc (HNP) at L5-S1, in addition to her degenerative disc disease, that she continued to have back pain and left buttock pain, and that in a long discussion he advised that she had two options, namely, continue with therapy and medications or undergo a discectomy. Claimant was to consider the options and get back to Dr. B. Claimant testified her pain from the injury did lessen with the prescribed physical therapy and medications and that she was last examined for that injury by Dr. B in December 1991. She indicated that in January 1992, she called Dr. B to advise she would decline back surgery. In a letter to carrier's adjustor dated January 3, 1992, Dr. B stated that he would assign claimant "10% whole body partial permanent physical impairment."

While claimant also said she had not been released by Dr. B to return to her former duties as a licensed vocational nurse (LVN), and that Dr. B "resigned" from her case in May or June 1992, she conceded she had not sought further medical treatment from Dr. B or any other provider after December 1991. She said that when her TIBS were suspended in May 1992, she was forced to look for work and applied for and received unemployment benefits from the Texas Employment Commission (TEC). She told the TEC she could work as a paralegal (but lacked experience) and that she held a real estate broker's license. She had voluntarily discontinued working in real estate in 1989.

Claimant also testified she was examined by (Dr. T) at the carrier's request on January 7, 1993. Dr. T's report stated his impression as degenerative disc disease, L5-S1, with probable HNP, and chronic lumbar muscle strain. In his estimation, claimant was not a candidate for surgery nor for return to work in her former occupation. He felt she had "reached her maximum medical recovery and would assign a 10% partial permanent disability rating to the whole body." Claimant stated that subsequent to this exam, she received a notice that carrier was going to initiate the payment of impairment income benefits.

Claimant's position respecting her having disability (Article 8308-1.03(16)) between May 1, 1992 and October 4, 1992, was that she still had some lingering back pain and that neither Dr. B nor any other doctor had released her to return to her former LVN duties, duties which involved lifting which she could not do. Claimant did say she had seen no doctor after seeing Dr. B in December 1991 and before seeing (Dr. H) on October 12, 1992 for a subsequent injury, and carrier argued that there would have been no occasion for a doctor to release her.

On October 4, 1992, claimant bumped her head attempting to climb into a tow truck and was knocked back to the ground, but landed on her feet. Claimant said she hurt her

head and the fall to the ground jarred her resulting in excruciating back pain in the same area as her previous injury. She said she saw Dr. H (on October 12th and 29th) for this injury. (Regrettably, Dr. H's records of those visits, introduced by both parties, are virtually illegible. The hearing officer would have been well within her discretion had she insisted they be read or transcribed so as to have some evidential value.) Claimant's apparent position regarding disability from and after the October 4th incident was that the tow truck injury aggravated her May 6, 1992 compensable injury because she had a return of pain in the same area. While the aggravation of a preexisting injury can amount to a compensable injury the injury giving rise to the aggravation must itself be a compensable injury, that is, it must have arisen in the course and scope of employment as defined by Articles 8308-1.03 (10) and (12). Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 92079, decided April 14, 1992. Claimant never contended that the tow truck incident occurred in the course and scope of her employment.

The carrier introduced a memorandum from Dr. A's medical assistant. According to this memo, claimant had called the assistant stating she had previously called with the insurance carrier on another line asking the assistant to state that the injury she was seen for was "workers' comp related," that Dr. H was not then available to verify such information, and that the insurance company lady had called the assistant back and was told the injury was not so related but was a different case. The memo went on to state that the assistant told claimant she had only stated what she had been told by Dr. H, that is, that "it was not related to worker's comp." The memo recited that claimant became upset stating that the assistant should not have talked to the carrier without claimant's permission. When asked about this memo, claimant denied such a conversation stating the assistant must have had someone else in mind.

As for her chipped tooth, claimant testified that when she fell off the chair on (date of injury), she had her glasses in her teeth and chipped a tooth when she hit the floor. She conceded she did not report the chipped tooth aspect of the injury to her employer or to any doctor, nor has she since sought dental treatment. She maintained that she did, however, so advise the carrier in her initial phone conversation with a male adjustor. The carrier introduced a tape recording (and transcript) of a telephone conversation between claimant and a female adjustor who was interviewing claimant about the (date of injury) injury. No mention was made by claimant of a chipped tooth, notwithstanding that the adjustor closed the interview by asking claimant whether she had anything else to say about the incident.

Regarding the esophagitis issue, claimant testified that she was prescribed Naprosyn by Dr. B for her back injury of (date of injury), that she started having "chest pains" at about the time she underwent an MRI in August 1991, that she was told the MRI did not cause such pains, and that (Dr. E) advised her in December 1991 that such pains were caused by the Naprosyn. Dr. E's December 27, 1991 report of claimant's December 6th visit for chest pain stated: "She had been treated for a back injury and was taking Voltaren followed by

Naprosyn and developed esophagitis. The Naprosyn was discontinued and she was treated with Axid and modified diet for her diagnosed esophagitis." The carrier introduced a document purporting to show all the medications prescribed for claimant's (date of injury) back injury. This document revealed that a single prescription for 15 Naprosyn tablets was written for claimant by Dr. B on May 17, 1991, the date she first sought medical treatment for her (date of injury) back injury, and that on May 23rd and June 18th, Dr. B wrote prescriptions for Voltaren, and, on August 27th, for Tylenol. Dr. B's record of May 17th also reflected he diagnosed back pain with degenerative disc disease at L5-S1 and placed claimant on Naprosyn. The carrier argued that such prescription history showed that rather than the history given Dr. E by claimant that she took Voltaren followed by Naprosyn, it was the other way around; that the Naprosyn was discontinued in May 1991 and would obviously not have been resulting in esophagitis as late as December 1991; and, that Dr. E's report merely recites the medication history and chronology provided by claimant and does not amount to a medical opinion. Claimant maintained, however, that Dr. B had given her five prescriptions for Naprosyn.

The findings and conclusions challenged by claimant are as follows:

FINDINGS OF FACT

4.The Claimant's testimony that on (date of injury), she also sustained a chipped front tooth injury at the same time that she sustained her low back injury but failed to immediately report it because she though that only injuries that produce disability were compensable for workers' compensation purposes is not credible.

5.The Claimant did not sustain a chipped front tooth injury on (date of injury) while engaged in an activity that was in furtherance of the business or affairs of [employer].

6.While the evidence shows that [Dr. E] stated in a report on December 27, 1991 that the Claimant developed esophagitis, the record does not establish what caused the Claimant's esophagitis condition.

7.The record does not establish that the Claimant's esophagitis condition was caused by prescription medication that the Claimant was prescribed for her low back injury sustained on (date of injury).

8.The Claimant was not unable to obtain and retain wages equivalent to her wages before (date of injury) as a result of the low back injury
that she sustained on (date of injury) from May 1, 1992 through October 4, 1992.

9.Prior to October 4, 1992, the low back condition and pain that the Claimant had as a result of her (date of injury) injury had improved.

10.On October 4, 1992, the Claimant sustained another low back injury while she was not working for [employer].

11.The Claimant's low back condition and inability to work as a result thereof on and after October 4, 1992 was solely due to the low back injury that she sustained on October 4, 1992.

12.The Claimant has not, from October, 4, 1992 to the date of this Contested Case Hearing, been unable to obtain and retain wages equivalent to her wages before (date of injury) as a result of the low back injury that she sustained on (date of injury).

CONCLUSIONS OF LAW

4.The Claimant did not sustain a compensable front chipped tooth injury on (date of injury) while in the course and scope of her employment with [employer].

5.The Claimant did not have disability as defined by the Texas Workers' Compensation Act as a result of her compensable low back injury sustained on (date of injury) from May 1, 1992 through October 4, 1992.

6.The esophagitis condition that the Claimant was diagnosed as having sustained in December 1991 is not compensable under the Texas Workers' Compensation Act.

7.The Claimant has not had disability as defined by the Texas Workers' Compensation Act as a result of her compensable low back injury sustained on (date of injury) on or after October 4, 1992.

8.The Claimant's low back condition and inability to work as a result thereof on and after October 4, 1992 was solely caused by an injury that the Claimant sustained on October 4, 1992.

9.Disputes concerning the necessity and/or reasonableness of medical treatment for a compensable injury are properly resolved through Medical Dispute Resolution pursuant to Article 8308-8.26 of the Texas Workers' Compensation Act.

Claimant had the burden to prove she sustained a chipped tooth as a part of her injury of (date of injury), that she suffered esophagitis as a result of medicine taken for her injury, that she had disability from May 1, 1992 through October 4, 1992, and that she had disability after October 4, 1992 from her (date of injury) injury. The hearing officer's findings reflect that claimant failed to meet her burden of proof on each of the disputed issues and we do not disagree. Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App. - Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises issues of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App. - Amarillo, no writ). We do not substitute our judgement for that of the hearing officer where, as here, the challenged findings and conclusions are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App. - Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be
manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex.1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge